No. 15681

United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY,
a corporation, *Appellant,*

vs.

ANDERSON CONSTRUCTION CO., INC., a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

REBATE PROMISE INVALID

The brief of appellee shows that it continues to resist recovery of the balance due for the appellant's lawful premium fixed by its applicable rates filed with and approved by the Insurance Commissioner, upon the ground that the oral promise of appellant's agent to charge a lower premium to be calculated at future undetermined rates neither filed nor approved, did not constitute a rebate.

In this effort, to escape the effects of the Washington Insurance Code, the brief of appellee (pp. 9, 10) said:

> "Initially we maintain that the oral premium agreement is valid and that these 'rebate' provisions simply do not apply to surety bond premiums at all. These provisions purport only to prohibit the giving and receiving of 'rebates' of premiums

> on insurance '*policies.*' Surety insurance contracts and surety bonds are not 'policies' either in common usage in the business world or in the Insurance Code."

On these primary propositions, the brief of appellee places much emphasis. However, these propositions are fallacious.

First, as to common usage, careful text authors disagree with the contention of appellee. Two such authorities, in writing quite some years ago, stated the contrary.

> "Suretyship or Insurance — Compensated Corporate Sureties. The distinction between suretyship or guaranty and certain forms of insurance, is shadowy and indistinct. This is notably true of so-called contract insurance, fidelity insurance, and credit indemnity insurance, and contracts of this class have been *construed as policies of insurance* rather than as strict suretyships or guarantees, and are treated of *as insurance policies* in works on insurance when issued in due course of business by corporations chartered for the purpose of writing them, though from the very nature of the risk and the situation of the parties they also involve the application of suretyship principles, and the contract itself takes the form of a bond rather than an ordinary policy of insurance, though in many of its features it resembles the latter. Indeed both suretyship and insurance cases are liberally cited and relied upon by the courts and text-writers in cases involving these '*surety bonds*' as they are commonly called."
>
> *Spencer on Suretyship* (1913) Section 7, pp. 11, 12.

"In a strict legal sense, the parties to the contract of guaranty insurance are two in number, who will be referred to herein under the names so familiar in other branches of insurance law as the 'insurer' and the 'insured.' This nomenclature, however, has not been adopted generally by the courts, which still make occasional use of the terms 'obligor' and 'obligee,' 'surety' and 'employer,' 'guarantor' and 'guarantee,' 'indemnitor' and 'indemnitee,' 'common surety,' etc. In the present work the words 'insurer' and 'insured' will be uniformly employed when referring to the parties to the contract of guaranty insurance, and *the contract itself will be referred to either as a 'policy' or a 'bond.'* This is done for the purpose of assimilating as far as possible in the subject now before us the terminology of general insurance law. Here again there is a noticeable absence of uniformity on the part of the courts in giving a name to the instrument issued by the guaranty companies to the insured. By some it is referred to simply as a 'bond'; others refer to it as an 'indemnity contract'; while still others refer to it as an 'insurance bond' or 'guaranty policy.' Throughout the present work *the terms 'policy' and 'bond' will be used interchangeably, as identical in meaning and legal effect.*"

The Law of Guaranty Insurance by Frost (Second Edition, 1909) Section 7, pp. 36, 37.

These quotations alone suffice to reflect that in common usage bonds by a corporate surety like the appellant, being recognized as executed merely within one classification of insurance, have long and often been termed "insurance contracts" or "insurance policies" or just "policies." However, judicial evidence of such

common usage appears from an early opinion of the Washington Supreme Court (antedating both the Insurance Code of 1911 and the Insurance Code of 1947) wherein that court cited with approval Frost's original edition of his work on "Guaranty Insurance." When quoting the author, the opinion written in 1903 said:

> " 'The contract of guaranty insurance is invariably entered into for a compensation, and usually after the fullest investigation, and frequently under stipulations largely technical in character, based upon written representations relative to the nature and extent of the risk. The POLICY is written by a company incorporated for the express purpose of furnishing guarantee bonds as a means of revenue to the corporation and its stockholders."
>
> *Cowles v. United States Fidelity and Guaranty Co.,* 32 Wash. 120, 125; 72 Pac. 1032, 1033 (Emphasis added.)

Second, as to the Insurance Code, the contention of Appellee is again wrong. To appraise the legislative usage in the Code, many provisions should be reviewed —these, for the convenience of the court, being quoted in the Appendix to this brief from the official statute, 1947 Session Laws, Chapter 79.

This Appendix shows that the Insurance Code was drafted and enacted in separate Articles with titles designating the subject matter of each. All provisions of the 1947 Code collected in the Appendix have been drawn from Articles numbered and entitled as follows:

Article One:	Initial Provisions
Article Eleven:	Insuring Powers
Article Seventeen:	Agents, Brokers, Solicitors, and Adjusters

Article Eighteen:	The Insurance Contract
Article Nineteen:	Rates
Article Twenty-eight:	Surety Insurance
Article Thirty:	Unfair Practices and Frauds

The titles of these Articles indicate that all treat of broad topics having general application to various kinds of insurance — that is, all except Article Twenty-eight covering "Surety Insurance" only. The Appendix quotes the whole of Article Twenty-eight in its entirety. A reading of Article Twenty-eight shows that in dealing with "Surety Insurance" alone, as a particular category of insurance, the legislature made no special or exclusive provision to effectuate the comprehensive regulatory purpose of the Code. Hence, obviously, the legislature intended to regulate surety insurance by the provisions of general application contained in the other Articles listed, to-wit: One, Eleven, Seventeen, Eighteen, Nineteen and Thirty.

This conclusion is directly fortified by almost the only opinion of the Washington Supreme Court involving surety bonds as affected by the Washington Insurance Code. In the litigation a corporate surety sued to recover its lawful premium on a construction bond guaranteeing performance of a road contract. The opinion said:

> "The provisions of our insurance code *here applicable* provide for the establishment of uniform regular premium rates and the filing of schedules thereof in the office of the state insurance commissioner, and also provide for penalties for the failure to observe such uniform rates in making charges for premiums. Section 7076, 7077, 7118,

7147, Rem. Comp. Stat. [P.C. §§2939, 2940, 2980, 3009.]"

American Surety Company v. Lind, 132 Wash. 326, 330; 232 Pac. 280, 282.

In making this ruling, the Supreme Court referred to certain Insurance Code provisions by citing sections of Remington's Compiled Statutes of Washington, in which Section 7077 is the same as Section 33 in the Insurance Code of 1911. This Section 33, also for the convenience of the court, has been quoted at the end of the Appendix to this brief. The present value of considering Section 33 in the repealed Insurance Code of 1911 is that, based on comparison with the current Insurance Code of 1947, the brief of Appellee (p. 20) said: "BOTH THE 'FILING' AND THE 'REBATE' PROVISIONS OF THE TWO CODES ARE SUBSTANTIALLY IDENTICAL." This concession by the Appellee coupled with the ruling of the Washington Supreme Court in the case of *American Surety Company v. Lind, supra,* makes conclusive that the requirements and prohibitions as to rate filings and rate rebates contained in the Insurance Code of 1947 are applicable to the transaction between the Appellee and the Appellant involved on this appeal. In short, under Section .30.14, the Appellant could not "give" a rebate and under Section .30.17 the Appellee could not "receive" a rebate without committing a violation of express law — despite the use in both these sections of the term "policy," upon which the Appellee would impress a restricted meaning inconsistent with both common usage and legislative intent.

WAY CASE DISTINGUISHED

The brief of Appellee hangs upon the hope of escape from liability on the contention that the case of *Way v. Pacific Lumber and Timber Company,* 74 Wash. 332; 133 Pac. 595 (1913) is "controlling." But, except for mere dictum, it is not in point. When arguing that by the *Way* case this court is compelled to give the effect of validity to an oral assent to a prohibited rebate in premium, the Appellee avoids quotation of the Washington Supreme Court revealing its real ruling—namely, that the plaintiff insurance agent had failed to prove any agreement by the defendant insured to pay for premium any greater amount than the lesser amount already paid. The court simply decided that:

> "Plaintiff can only recover upon a contract, express or implied * * * . * * * It follows, there being no contract or promise made by the defendant to pay a greater sum than has been paid, and none implied by statute, that the judgment should be affirmed."
>
> *Way v. Pacific Lumber and Timber Co.,* 74 Wash. 332, 333, 334; 133 Pac. 595, 596.

Thus is disclosed basic distinction between the facts considered in the *Way* case and the facts involved in this appeal. There the plaintiff insurance agent sued the defendant insured upon a policy which specified only the lesser rebate premium, being denied recovery because of inability to prove promise to pay the greater legal premium which was not specified by the policy. In contrast, here the Appellant sues the Appellee upon bonds which specified only the greater legal premium and the defendant defends on a prior oral promise by

Appellant's agent of a lesser rebate premium. In this action, for its recovery of the balance due upon its lawful premium, the Appellant has relied upon an express written contract consisting first of signed application and second of executed bonds, all inherent parts of a single transaction.

The brief of Appellee (p. 26) asks "where is this" agreement? The Appellant replies it is in the record, established without dispute by the documents mentioned coupled with the admissions of witnesses testifying in behalf of the Appellee.

In barest outline, the transaction was the delivery of performance and payment bonds to the United States as obligee to secure a job of construction costing over $6,000,000.00, in behalf of the joint venture composed of three members (Islands Construction Company, Inc., Montin-Benson Corporation and Anderson Construction Co., Inc.) separate identical bonds being individually executed by each member as a principal and all bonds being executed by the Appellant as surety, pursuant to written application therefor earlier signed by all three members with their agreement for payment of premium.

Chronologically developed, the joint venture arranged to bid for the Government contract before the 18th of May, 1955, according to Anderson, the Appellee's president. (R. 308) He and Baldwin, president of Islands Construction Company, Inc., drew an oral promise of a saving of premium based on future rates from Beeson, Appellant's agent, during an interview in

the "early" or the "middle" part of May, 1955. (R. 277, 293, 297, 308) Anderson signed the application for bonds "prior to May 25, 1955" sometime in "the latter part of May". (R. 105, 106) According to testimony for Appellee, when so signed, the figures ($47,753.72) specifying the amount of the premium had not yet been inserted in the application. However, the application—being the obligation of the joint venture and all members jointly and severally—conferred upon the Appellant positive authority "to fill up any blanks left" therein. (Original, Ex. 1; copy attached to Complaint as Ex. A; R. 6, 7, 11)

The bid of the joint venture for the construction contract being acceptable to the United States, performance bonds and payment bonds were later prepared on forms prescribed by the Government, which required that each kind of bond be executed individually by each member of the joint venture. The bonds were so executed. (Ex. 2; Ex. 3; Ex. 7; Ex. 10; R. 109, 111, 145, 146, 169) Each performance bond on the reverse side of the single sheet, at the top of the page immediately above the certificate of the corporate officer attesting the due execution thereof, contained the following: "TOTAL AMOUNT OF PREMIUM CHARGED $47,753.72". Each payment bond in similar prominent location contained the following: "TOTAL AMOUNT OF PREMIUM CHARGED $ PREMIUM INCLUDED IN CHARGE FOR PERFORMANCE BOND".

By the formal agreement of the joint venture, its administrative management was delegated to Islands Construction Company, Inc., except in a very important

matter — "the matter of insurance and bonds" for which Anderson and Baldwin together were personally responsible. (Ex. 9; R. 112, 135, 264, 291)

In consequence, the performance bonds and the payment bonds, having been fully and individually executed in behalf of each member of the joint venture by its president and an attesting corporate officer, were lodged with Baldwin who caused four signed copies of the $6,000,000.00 construction contract and all bonds to be delivered to the United States Corps of Engineers at Anchorage, Alaska, with a letter of transmittal dated the 13th of June, 1955. (Ex. 8; R. 145, 146, 147, 148, 149) At that time the payment bonds specified the sum of $47,753.72 as Appellant's premium. (R. 57, 149)

When the performance and payment bonds were executed by Anderson as president, with the attestation of another corporate officer of Anderson Construction Co., Inc., the Appellee became directly bound to pay Appellant's premium as specified in those bonds. When four signed copies of the construction contract and of all bonds were delivered by Baldwin acting through Islands Construction Company, Inc., as authorized manager of the joint venture, the Appellee, as a member of the joint venture, became indirectly bound to pay Appellant's premium as specified in those bonds.

The execution and delivery of the performance and payment bonds specifying exactly the amount of the Appellant's lawful premium made quite superfluous and wholly immaterial the presence or absence of any premium figure whatsoever in the earlier application

for such bonds. The bonds themselves, being deliberately signed by all obligors and finally delivered to the obligee were alone self-sufficient to constitute an express written agreement as to the amount of premium. This agreement among all parties involved in the bonds operated as a matter of law to supersede any prior understanding for a rebate based on Beeson's oral promise. This agreement is established in the record without dispute. (Pre-Trial Order, Admitted Facts, R. 57)

CONCLUSION

In closing, the Appellant requotes briefly certain provisions of the Washington Insurance Code as follows:

> "Sec. .18.18 *The premium stated in the policy shall be inclusive of all fees, charges, premiums, or other consideration charged for the insurance or for the procurement thereof.*"

> "Sec. .18.19 *No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.*"

> "Sec. .30.17 *No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof.*"

In closing, the Appellant repeats its contention that the Appellee's defense is based solely upon an oral promise invalidated and prohibited by express statute. Hence, an allowance of such defense by disallowance of Appellant's appeal would constitute judicial assistance to a violation of law.

Respectfully submitted,

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APPENDIX

WASHINGTON INSURANCE CODE
(Laws 1947, Chapter 79)

ARTICLE ONE

INITIAL PROVISIONS

SEC. .01.02 Scope of Code: All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code.

SEC. .01.04 "Insurance" Defined: Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.

SEC. .01.05 "Insurer" Defined: "Insurer" as used in this code includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society. A reciprocal or inter-insurance exchange is an "insurer" as used in this code.

SEC. .01.06 "Insurance Transaction" Defined: "Insurance transaction" includes any:

(1) Solicitation.
(2) Negotiations preliminary to execution.
(3) Execution of an insurance contract.
(4) Transaction of matters subsequent to execution of the contract and arising out of it.
(5) Insuring.

SEC. .01.07 "Person" Defined: "Person" means any individual, company, insurer, association, organization, reciprocal or inter-insurance exchange, partnership, business trust, or corporation.

Article Eleven

Insuring Powers

Sec. .11.01 Kinds of Insurance and Capital Required: 1. Domestic stock insurers may transact kinds of insurance in this state upon qualifying therefor and by having paid-in capital and surplus represented by assets, all as follows:

* * *	Minimum Capital Required	Minimum Surplus Initially Required
(6) Surety insurances	$300,000.00	$100,000.00
(a) Surety		

Sec. .11.08 Surety Insurance Defined: Surety insurance includes:

(1) Credit insurance as defined in item (9) of section .11.07.

(2) Bail bond insurance as defined in section .11.09.

(3) Fidelity insurance, which is insurance guaranteeing the fidelity of persons holding positions of public or private trust.

(4) Guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship.

(5) Indemnifying banks, bankers, brokers, financial or moneyed corporations or associations against loss resulting from any cause of bills of exchange, notes, bonds, securities, evidence of debts, deeds, mortgages, warehouse receipts, or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, including any loss while the same are being transported in armored motor ve-

hicles, or by messenger, but not including any other risks of transportation or navigation; also against loss or damage to such an insured's premises, or to his furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt thereat.

Article Seventeen

Agents, Brokers, Solicitors, and Adjusters

Sec. .17.21 Minimum License Combinations: Except as provided in section .17.19, an agent's license shall not be issued unless it includes, and the applicant is qualified for, one (1) or more of the following kinds of insurance:

(1) Casualty.
(2) Disability.
(3) Life.
(4) Marine and transportation.
(5) Property.
(6) Surety.
(7) Vehicle.

Sec. .17.48 Reporting and Accounting for Premiums: 1. An agent or any other representative of an insurer involved in the procuring or issuance of an insurance contract shall report to the insurer the exact amount of consideration charged as premium for such contract, and such amount shall likewise be shown in the contract and in the records of the agent. Each willful violation of this provision shall constitute a misdemeanor.

Article Eighteen

The Insurance Contract

Sec. .18.01 Scope of Article: The applicable provi-

sions of this article shall apply to insurances other than ocean marine and foreign trade insurances. This article shall not apply to life or disability insurance policies not issued for delivery in this state nor delivered in this state.

SEC. .18.10 Approval of Forms: 1. No insurance policy form other than surety bond forms, or application form where written application is required and is to be attached to the policy, or printed life or disability rider or endorsement form shall be issued, delivered, or used unless it has been filed with and approved by the Commissioner. This section shall not apply to policies, riders or endorsements of unique character designed for and used with relation to insurance upon a particular subject.

SEC. .18.14 Content of Policies in General: 1. The written instrument, in which a contract of insurance is set forth, is the policy.

2. A policy shall specify:

(1) The names of the parties to the contract. The insurer's name and type of organization shall be clearly shown in the policy.

(2) The subject of the insurance.

(3) The risks insured against.

(4) The time at which the insurance thereunder takes effect and the period during which the insurance is to continue.

(5) A statement of the premium, other than as to surety bonds, and if other than life, disability, or title insurance, the premium rate.

(6) The conditions pertaining to the insurance.

3. If under the contract the exact amount of premiums is determinable only at termination of the con-

tract, a statement of the basis and rates upon which the final premium is to be determined and paid shall be furnished any policy examining bureau having jurisdiction or to the insured upon request.

4. This section shall not apply to surety insurance contracts.

Sec. .18.17 "Premium" Defined: "Premium" as used in this code means all sums charged, received, or deposited as consideration for an insurance contract or the continuance thereof. Any assessment, or any "membership," "policy," "survey," "inspection," "service" or similar fee or charge made by the insurer in consideration for an insurance contract is deemed part of the premium.

Sec. .18.18 Stated Premium Must Include All Charges: 1. The premium stated in the policy shall be inclusive of all fees, charges, premiums, or other consideration charged for the insurance or for the procurement thereof.

2. No insurer or its officer, employee, agent, solicitor, or other representative shall charge or receive any fee, compensation, or consideration for insurance which is not included in the premium specified in the policy.

3. Each violation of this section is a gross misdemeanor.

Sec. .18.19 Must Contain Entire Contract: No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.

Sec. .18.48 Discrimination Prohibited: No insurer shall make or permit any unfair discrimination in favor of particular individuals or persons, or between insureds or subjects of insurance having substantially like insuring, risk, and exposure factors, or expense elements, in the terms or conditions of any insurance

contract, or in the rate or amount of premium charged therefor, or in the benefits payable or in any other rights or privileges accruing thereunder. This provision shall not prohibit fair discrimination by a life insurer as between individuals having unequal expectations of life.

Article Nineteen

Rates

Sec. .19.01 Scope of Article: 1. Except as is otherwise expressly provided the provisions of this article apply to all insurances upon subjects located, resident or to be performed in this state except:

(1) Life insurance;

(2) Disability insurance;

(3) Reinsurance, except as to joint reinsurance as provided in section .19.36;

(4) Insurance against loss of or damage to aircraft, their hulls, accessories, and equipment, or against liability, other than Workmen's Compensation and employers' liability, arising out of the ownership, maintenance or use of aircraft;

(5) Insurance of vessels or craft, their cargoes, marine builders' risks, marine protection and indemnity; and such other risks commonly insured under marine, as distinguished from inland marine, insurance contracts as may be defined by ruling of the Commissioner for the purposes of this provision;

(6) Title insurance.

2. Except, that every insurer shall, as to disability insurances, before using file with the Commissioner its manual of classification, manual of rules and rates, and any modifications thereof.

Sec. .19.02 Rate Standard: Premium rates for in-

surance shall not be excessive, inadequate, or unfairly discriminatory. This section does not apply to casualty insurance.

SEC. .19.03 Making of Rates: Rates shall be used, subject to the other provisions of this article, only if made in accordance with the following provisions:

(1) In the case of insurances under standard fire policies and that part of marine and transportation insurances not exempted under section .19.01, manual, minimum, class or classification rates, rating schedules or rating plans, shall be made and adopted; except as to specific rates on inland marine risks individually rated, which risks are not reasonably susceptible to manual or schedule rating, and which risks by general custom of the business are not written according to manual rates or rating plans.

(2) In the case of casualty and surety insurances:

(a) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable.

(b) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Such standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses.

(3) Due consideration in making rates for all insurances shall be given to:

(a) Past and prospective loss experience within and outside this state; and in the case of rates for fire insurance, to the loss experience of insurers as to insurance against fire during a period of not less than the most recent five-year period for which such experience is available.

(b) Conflagration and catastrophe hazards, where present.

(c) A reasonable margin for underwriting profit and contingencies.

(d) Dividends, savings and unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers.

(e) All other relevant factors within and outside this state.

(4) In addition to other factors required by this section, rates filed by an insurer on its own behalf may also be related to the insurer's plan of operation and plan of risk classification.

(5) Except to the extent necessary to comply with section .19.02 uniformity among insurers in any matter within the scope of this section is neither required nor prohibited.

Sec. .19.04 Filing Required: 1. Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates, and every rating plan as to surety insurances, and every rating schedule, minimum rate, class rate, and rating rule as to other insurances, and every modification of any of the foregoing which it proposes. The insurer need not so file any rate on individually rated risks as described in item (1) of section .19.03; except that any such spe-

cific rate made by a rating organization shall be filed. This section does not apply to casualty insurance.

2. Every such filing shall state its proposed effective date and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the Commissioner does not have sufficient information to determine whether the filing meets the requirements of this article, he may require the insurer to furnish the information upon which it supports the filing. An insurer may offer in support of any filing

(1) the experience or judgment of the insurer or rating organization making the filing,

(2) the experience of other insurers or rating organizations, or

(3) any other factors which the insurer or rating organization deems relevant. A filing and any supporting information shall be open to public inspection only after the filing becomes effective.

3. Where a filing is required no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect, except as is provided by section .19.09.

Sec. .19.05 Filings by Bureau: 1. If so authorized by an insurer, the Commissioner shall accept, in lieu of filings by the insurer, filings on its behalf made by a rating organization then licensed as provided in this article.

Sec. .19.07 Special Filings: The following special filings, when not covered by a previous filing, shall become effective when filed and shall be deemed to meet the requirements of this article until such time as the Commissioner reviews the filing and for so long thereafter as the filing remains in effect:

(1) Special filings with respect to surety or guaranty bonds required by law or by court or executive order or by order, rule or regulation of a public body.

(2) Specific rates on inland marine risks individually rated by a rating organization, which risks are not reasonably susceptible to manual or schedule rating, and which risks by general custom of the business are not written according to manual rates or rating plans.

SEC. .19.17 Application for License: 1. Any person, whether domiciled within or outside this state, except as provided in paragraph two of this section, may make application to the Commissioner for a license as a rating organization for such kinds of insurance or subdivisions thereof, if for casualty or surety insurances, or for such subdivision, class of risks or a part or combination thereof, if for other insurances, as are specified in its application, and shall file therewith:

(1) A copy of its constitution, its articles of agreement or association, or its certificate of incorporation, or trust agreement, and of its by-laws, rules and regulations governing the conduct of its business;

(2) A list of its members and a list of its subscribers;

(3) The name and address of a resident of this state upon whom notices or orders of the Commissioner or process affecting such rating organization may be served, and

(4) A statement of its qualifications as a rating organization.

2. Any rating organization proposing to act as such as to insurance under standard form fire policies, shall be licensed only if all the following conditions are complied with:

(1) The applicant and the operators of such rating

organization shall be domiciled in and shall actually reside in this state.

(2) The ownership of such rating organization shall be vested in trustees for all its subscribers under such trust agreement as is approved by the Commissioner, and the rating organization shall be and shall be conducted as a non-profit public service institution.

(3) Such rating organization shall not be connected with any insurer or insurers except to the extent that any such insurer may be a subscriber to its services.

Sec. .19.28 Deviations: 1. Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization, and shall not deviate therefrom except as provided in this section.

2. Any such subscriber may make written application to the Commissioner for permission to file a deviation, and shall at the same time send a copy of the application to the rating organization. The application shall specify the deviation desired, and the basis thereof. In the case of deviations as specified in paragraph four of this section, the application shall be accompanied by the data upon which the applicant relies. The Commissioner shall forthwith set a date for a hearing on the application and give notice thereof to the applicant and to the rating organization. If the rating organization informs the Commissioner that it does not desire a hearing he may, upon consent of the applicant, waive the hearing.

3. As to fire insurance under standard form fire policies, any such deviation shall be only by a uniform percentage of addition to or decrease from all rates resulting from all filings relative to such insurance made by the rating organization on behalf of such applicant and then in effect.

In considering the application for permission to file

such deviation the Commissioner shall give consideration to the available statistics and the applicable principles for rate making as provided in section .19.03.

4. As to insurance other than that designated in paragraph three of this section, any such deviation shall be only by a uniform percentage decrease or increase to be applied to the premiums produced by the rating system so filed for a kind of insurance, or for a class of insurance which is found by the Commissioner to be a proper rating unit for the application of such uniform percentage decrease or increase, or for a subdivision of a kind of insurance (1) comprised of a group of manual classifications which is treated as a separate unit for rate making purposes, or (2) for which separate expense provisions are included in the filings of the rating organization.

5. If upon such hearing the Commissioner finds the proposed deviation to be justified, and that premiums and rates resulting therefrom would not be inadequate, excessive, or unfairly discriminatory, he shall issue his order permitting the deviation to be filed and such deviation shall thereupon become effective. If he finds otherwise, he shall issue his order denying the application.

6. Each deviation permitted to be filed shall be effective for a period of not less than one (1) year from the date of such permission unless terminated sooner with the approval of the Commissioner. Every such deviation shall terminate upon a material change of the basic rate from which the deviation is made. The Commissioner shall determine whether a change of the basic rate is so material as to require such termination of deviations.

7. This section does not apply to casualty insurance.

Article Twenty-eight

Surety Insurance

Sec. .28.01 Requirements Deemed Met by Surety Insurer: Whenever by law or by rule of any court, public official, or public body, any surety bond, recognizance, obligation, stipulation, or undertaking is required or is permitted to be given, any such bond, recognizance, obligation, stipulation, or undertaking which is otherwise proper and the conditions of which are guaranteed by an authorized surety insurer, or by an unauthorized surety insurer as a surplus line pursuant to article fifteen of this code, shall be approved and accepted and shall be deemed to fulfill all requirements as to number of sureties, residence or status of sureties, and other similar requirements, and no justification by such surety shall be necessary.

Sec. .28.02 Fiduciary Bonds, Expense: Any fiduciary required by law to give bonds, may include as part of his lawful expense to be allowed by the court or official by whom he was appointed, the reasonable amount paid as premium for such bonds to the authorized surety insurer or to the surplus line surety insurer which issued or guaranteed such bonds.

Sec. .28.03 Court Bonds, Costs: In any proceeding the party entitled to recover costs may include therein such reasonable sum as was paid to such surety insurer as premium for any bond or undertaking required therein, and as may be allowed by the court having jurisdiction of such proceeding.

Sec. .28.04 Public Officers' Bonds, Costs: The premium for bonds given by such surety insurers for appointive or elective public officers and for such of their deputies or employees as are required to give bond shall be paid by the state, political subdivision, or public body so served.

Sec. .28.05 Release from Liability: A surety insurer may be released from its liability on the same terms and conditions as are provided by law for the release of individuals as sureties.

Article Thirty

Unfair Practices and Frauds

Sec. .30.01 Unfair Practices in General: 1. No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair and deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to paragraph two of this section.

2. In addition to such unfair methods and unfair or deceptive acts or practices as are expressly defined and prohibited by this code, the Commissioner may from time to time by regulations promulgated only after a hearing thereon, define other methods of competition and other acts and practices in the conduct of such business reasonably found by him to be unfair or deceptive.

Sec .30.14 Rebates: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.

2. Paragraph one of this section shall not apply as

to commissions paid to a licensed agent, general agent, broker, or solicitor for insurance placed on his own property or risks, if the aggregate of such commissions does not exceed five per cent (5%) of the total net commissions received by the agent, general agent, broker, or solicitor during the same twelve-month period.

3. This section shall not apply to the allowance by any marine insurer, or marine insurance agent, general agent, broker, or solicitor, to any insured, in connection with marine insurance, of such discount as is sanctioned by custom among marine insurers as being additional to the agent's or broker's commission.

SEC. .30.17 Receiving Rebate: 1. No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker, or solicitor. The retention by the nominal policyholder in any group life insurance contract of any part of any dividend or reduction of premium thereon contrary to the provisions of section .24.26, shall be deemed the acceptance and receipt of a rebate and shall be punishable as provided by this code.

2. The amount of insurance whereon the insured has so received or accepted any such rebate or any such commission, other than as to life or disability insurances, shall be reduced in the proportion that the amount or value of the rebate or commission bears to the premium for such insurance. In addition to such reduction of insurance, if any, any such insured shall be liable to a fine of not more than two hundred dollars ($200).

WASHINGTON INSURANCE CODE

(Laws 1911, Chapter 49)

[Section 33 as below quoted is identical with Section 7077 of Remington's Compiled Statutes cited by the Supreme Court of the State of Washington in *American Surety Company v. Lind,* 132 Wash. 326, 330, 232 Pac. 280, 282.]

Article One

General Provisions

Sec. 33. Rebates Prohibited.

No insurance company, by itself or any other party, and no licensed insurance agent, solicitor, or broker, personally or by any other party, shall offer, promise, allow, give, set off, or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy, or on any policy, or agent's commission thereon, or earnings, profit, dividends, or other benefit founded, arising, accruing or to accrue thereon, or therefrom, or any other valuable consideration or inducement to or for insurance, on any risk in this state now or hereafter to be written, which is not specified in the policy contract of insurance; nor shall any such company, agent, solicitor, or broker, personally or otherwise, offer, promise, give, sell, or purchase any stocks, bonds, securities, or property, or any dividends or profits accruing or to accrue thereon, or other thing of value whatsoever as inducement to insurance or in connection therewith which is not specified in the policy. The license of any insurance company, agent, solicitor, or broker who violates the provisions of this section shall be revoked and no license shall be issued to such company, agent, solicitor, or broker within one year from the date of the revocation of the license.

No insured person or party shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or agent's, solicitor's, or broker's commission thereon payable on the policy, or on any policy of insurance, or any favor or advantage or share in the dividend or other benefits to accrue thereon, or any valuable consideration or inducement, not specified in the policy contract of insurance; the amount of the insurance whereon the insured has received or accepted, either directly or indirectly, any rebate of the premium or agent's, solicitor's, or broker's commission thereon, shall be reduced in such proportion as the amount or value of such rebate, commission, dividend, or other consideration so received by the insured, bears to the total premium on such policy, and any such insured shall be liable, in addition to having the insurance reduced, to a fine of not more than two hundred dollars. No person shall be excused from testifying, or from producing any books, papers, contracts, agreements, or documents at the trial of any person charged with violating any provision of this act, on the ground that such testimony or evidence may tend to incriminate himself, but no person shall be prosecuted for any act concerning which he shall be compelled so to testify or produce evidence, documentary or otherwise, except for perjury committed in so testifying. Rebates affecting life insurance shall be governed by section one hundred eighty of this act.